No. 92-679

(2)

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1992

Columbia Gas Transmission Corporation,

Petitioner,

vs.

An Exclusive Underground Natural Gas Storage Easement In The Clinton Subterranean Geological Formation Beneath A 264.12 Acre Parcel In Plain Township, Wayne County, Ohio; Matthew Kim McCullough; LuAnn McCullough; Federal Land Bank Of Louisville; Ross McCullough, Jr.; Phyllis G. McCullough; Joanne Spiglemire, Treasurer, Unknown Interested Other Parties To Plaintiff; Universal Exploration, Inc.,

Respondents.

Petition For A Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit

Memorandum Of The Respondents

Matthew Kim McCullough, LuAnn McCullough, and Universal Exploration, Inc.

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November 13, 1992

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Is the measure of just compensation for property condemned under Section 7(h) of the Natural Gas Act, 15 U.S.C. §717(f), determined by federal law or by the law of the state where the property is located.

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An Exclusive Underground Natural Gas Storage Easement in the Clinton Subterranean Geological Formation Beneath a 264.12 Acre Parcel in Plain Township, Wayne County, Ohio; Matthew Kim McCullough; LuAnn McCullough; Federal Land Bank of Louisville; Ross McCullough, Jr.; Phyllis G. McCullough; Joanne Spiglemire, Treasurer, Unknown Interested Other Parties to Plaintiff; Universal Exploration, Inc.,

Respondents

Respondents Memorandum
to Petition for Writ of Certiorari
from Columbia Gas Transmission Corporation

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 962 F.2d 1192 and is reproduced in the attached Appendix on pages 1a-18a. The opinion of the district court is unreported and is reproduced at Appendix pages 21a-26a. The Rule 71A(h) commission report and supplemental report are reproduced at Appendix pages 54a-61a. Both the Petitioner and this Respondent requested rehearing and rehearing en banc, which were summarily denied.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1992. Timely petitions for rehearing were denied on July 23, 1992. This Court has jurisdiction under 28 U.S.C. §1254(1).

THE CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED IN THIS CASE

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Subsections (c) and (h) of Section 7 of the Natural Gas Act, 15 U.S.C. §717f(c,h), and Rule 71A of the Federal Rules of Civil Procedure are reproduced at Appendix pages 62a, 63a, 64a.

SUMMARY

The Respondents[1] join in full support of the Petitioner's request for a Writ of Certiorari. In the matter at bar, the United States Court of Appeals for the Sixth Circuit, in a case of first impression, decreed sua sponte that the method of determining the value of property appropriated for a federally licensed project under the Natural Gas Act[2] must be determined by state standards. That decision is at odds with prior rulings of this Court and with the general protection guaranteed to citizens under the Fifth Amendment.

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[1] Pursuant to Rule 29.1, the Respondent Universal Exploration, Inc. states that it is not a parent or subsidiary of another corporation.

[2] 15 U.S.C. §717 et. seq.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION IN THE CASE AT BAR IS INCONSISTENT WITH PRIOR RULINGS OF THIS COURT AND WITH THE REQUIREMENTS OF THE FIFTH AMENDMENT.

The matter at bar concerns a condemnation action, brought pursuant to a federal statute, in a federal court by a federally licensed utility company for a multi-state pipeline and gas storage project. The specific issue before the Court is whether the method of determining just compensation for the landowner who is forced to sell due to an exercise of the United States' eminent domain authority should follow state or federal case law principals.

The eminent domain provision of the Natural Gas Act, 15 U.S.C. §717f(h), authorizes the condemnation of property for the construction of certificated interstate natural gas pipeline facilities. The eminent domain provision of the Natural Gas Act specifically provides that local law be followed on procedural matters, but is silent as to substantive law to be followed. The clear implication of Congress adopting a state law provision for procedural issues and silence by Congress as to the law under which substantive issues are to be addressed is that federal law applies to the substantive issues.

Almost fifty years ago, this Court set out the basic rule that unless Congress legislated otherwise, the substantive law governing federal appropriations shall be federal law. In *United States v. Miller*, 317 U.S. 369 (1943), *reh'g denied*, 318 U.S. 798 (1943), the landowners sought the use of state law for both procedural and substantive issues arising out of a federal

appropriation of land for use as a private railroad right-of-way. The Reclamation Act, under which the appropriation was authorized, stated that local law would govern procedural issues, and like the Natural Gas Act was silent on the subject of substantive law.

In *Miller*, this Court recognized the importance of adherence to the local practice for procedural issues such as notice and venue. However, on substantive questions of law, including valuation methods, this Court felt compelled by the Constitution of the United States to apply federal law.

> We need not determine what is the local law, for the federal statutes [footnote omitted] upon which reliance is placed require only that, in condemnation proceedings, a federal court shall adopt the forms and methods of procedure afforded by the law of the State in which the court sits. They do not, and could not, affect questions of substantive right — such as the measure of compensation — grounded upon the Constitution of the United States [footnote omitted].

Id. at 379-80.

The philosophy of the *Miller* case is easy to articulate. Fundamental fairness incorporated in the Fifth Amendment of the United States Constitution compels a finding that like payment be given for like property regardless of state boundary when the federal government forces a sale for an interstate project. This basic premise has generally been followed by the Circuit Courts.

In *United States v. Certain Parcels of Land in City of Philadelphia*, 144 F.2d 626 (3d Cir. 1944), the Third Circuit held that Pennsylvania's concept of market value for purposes of eminent domain did not apply to a condemnation proceeding

brought by the United States against land in Pennsylvania since the measure of compensation is a question of substantive right grounded in the United States Constitution. Similarly, in *Nebraska v. United States,* 164 F.2d 866 (8th Cir. 1947), *cert. denied,* 334 U.S. 815 (1948), the Eighth Circuit refused to apply Nebraska state law on the condemnation of 19,500 acres for an ammunition storage field and held that the question of compensation in a federal government condemnation under the Fifth Amendment must be valued under federal law.

In sum, the Constitution of the United States and Supreme Court and Circuit Court precedent dictate the use of federal substantive law for determination of compensation in federal appropriation cases.

II. THE SIXTH CIRCUIT'S APPLICATION OF THE HOLDING IN *GEORGIA POWER* TO APPROPRIATIONS UNDER THE NATURAL GAS ACT IS IN ERROR.

The Sixth Circuit's ruling that state substantive law must apply is based on an analogy between the case at bar and the Fifth Circuit's decision in *Georgia Power Company v. Sanders,* 617 F.2d 1112 (5th Cir. 1980), *cert. denied, Georgia Power Co. v. 138.30 Acres of Land,* 450 U.S. 936 (1981). In *Georgia Power,* the Fifth Circuit found that state substantive law should be applied on an appropriation conducted under Section 21 of the Federal Power Act[3].

A review of the United States Code reveals that there are 33 separate statutes with eminent domain provisions (see Appendix on pages 71a-77a which lists and summarizes the statutes).

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[3] 16 U.S.C. §814.

The case law covering 32 of these statutes declare (often citing *Miller*) that substantive issues are governed by federal law, or are silent on the issue. The Federal Power Act as interpreted by the Fifth Circuit is alone in applying state substantive law.

To distinguish *Georgia Power* from *Miller*, the Fifth Circuit applied the test for the use of federal common law established in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). Based on the following three observations, the Fifth Circuit concluded that the local interest outweighed the national interest and applied Georgia substantive law for the appropriation.

First, the condemnation by the Georgia Power Company was local in scope and could have been carried out under state utility eminent domain authority.[4] Second, in order to use the Federal Power Act, a licensee must demonstrate to the Federal Energy Regulatory Commission that the proposed project will not affect the "development of any water resources for public purposes that should be undertaken by the United States itself."[5] Third, a licensee under the Federal Power Act need not be a public utility and may be a manufacturer seeking the license for purposes of profit.

A comparison of the three factors by which the Fifth Circuit distinguished the *Miller* line of cases underscores why federal law should apply in the matter at bar. First, Columbia Gas Transmission Corporation operates in several states and could not qualify as a state utility. In Ohio, as in Georgia, state chartered public utilities do have state powers of eminent domain; however, given the local interest, all state chartered

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[4] *Georgia Power*, 617 F.2d at 1122.

[5] *Id.* at 1118.

utilities must be incorporated in Ohio.[5] Columbia, as a Delaware Corporation whose assets are located in six states in addition to Ohio, does not and could not fit the Ohio regulatory scheme.

Second, there is no section of the Natural Gas Act that is remotely comparable with Section 7 of the Federal Power Act. Section 7 of the Federal Power Act requires a demonstration by the licensee that the project should not be of interest to the federal government. The Court in *Georgia Power* summarized this lack of national interest provision by noting,

> Before a license may be issued under the Federal Power Act, there must be a determination by the [Federal Power] Commission that the project does not affect the "development of any water resources for public purposes [that] should be undertaken by the United States itself" 16 U.S.C. §800(b). Thus, by definition, a licensed project [under the Federal Power Act] does not implicate the interests of the United States to the degree that it is thought desirable that the project be undertaken by the United States itself.

Id. at 1118.

On its face, Section 7 of the Federal Power Act seems to mandate that only local interest projects be developed under this class of license. This is the antithesis of the Natural Gas Act

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[5] O.R.C. §4905.62. No franchise, permit, license, or right to own, operate, manage, or control any public utility which is an electric light company, gas company, water-works company, sewage disposal system company or heating and cooling company shall be granted or transferred to any corporation not incorporated under the laws of this state.

which envisions a national network of interconnected pipelines delivering a fungible good.[7]

The third test mentioned by the Fifth Circuit in its differentiation of *Georgia Power* from the *Miller* line of cases is the fact that the condemnor was a private corporation and not a governmental agency. The Petitioner is also a private corporation, but that factor is not a significant similarity. In fact, the four Circuit Court Judges who dissented in *Georgia Power* when it was heard en banc stated in their dissent that they believed that there was no difference between condemnation brought by the United States itself and an agent or licensee of the United States performing within a statutorily delegated authority.

Thus far, only the Second Circuit has followed the *Georgia Power* precedent in an interpretation of the Federal Power Act. Recently, the Second Circuit faced the question of whether to apply state or federal law in the course of a federal condemnation by Amtrak and rejected the application of the *Georgia Power* holding. In *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2nd Cir. 1987), the issue was whether Amtrak, which by its charter is not a governmental body, should have state or federal law applied to determine valuation in a condemnation action. The Second Circuit considered the *Kimbell* test and found that the importance of uniformity for a rail system that will cross state boundaries required the application of federal law. The Second Circuit distinguished the local focus of Section 7 of the Federal Power Act (which requires a finding of no national interest to obtain a license) with the desire of Congress to foster a national passenger rail system.

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[7] *Thatcher v. Tennessee Gas Transmission*, 180 F.2d 644 (5th Cir. 1950), *cert. denied*, 340 U.S. 829 (1950).

The *National Railroad Passenger Corp.* decision, rather than the *Georgia Power* opinion, is dispositive of the matter at bar. The Sixth Circuit errored by using the *Georgia Power* example rather than *National Railroad Passenger Corp.* as to whether to apply federal substantive law in a federal appropriation.

CONCLUSION

The just compensation requirement of the Fifth Amendment of the United States Constitution requires the United States or a licensee acting under the eminent domain powers of the United States to compensate citizens under federal law in condemnation proceedings under the Natural Gas Act. The Sixth Circuit should have followed the *Miller* line of cases and should not have imposed the use of state substantive law in the case at bar.

WHEREFORE, for the foregoing reasons, the Respondents respectfully requests that the Supreme Court find that federal law should be applied in the condemnation proceeding at bar, and reinstate the District Court's ruling.

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November 13, 1922

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 91-3360

COLUMBIA GAS TRANSMISSION CORPORATION,
Plaintiff-Appellant,

v.

AN EXCLUSIVE NATURAL GAS STORAGE EASEMENT IN THE CLINTON SUBTERRANEAN GEOLOGICAL FORMATION BENEATH A 264.12 ACRE PARCEL IN PLAIN TOWNSHIP, WAYNE COUNTY, OHIO; MATHEW KIM MCCULLOUGH; LUANN MCCULLOUGH; FEDERAL LAND BANK OF LOUISVILLE; ROSS MCCULLOUGH, JR.; PHYLLIS G. MCCULLOUGH; JOANNE SPIGLEMIRE, TREASURER; UNKNOWN INTERESTED OTHER PARTIES TO PLAINTIFF; UNIVERSAL EXPLORATION, INC.,
Defendants-Appellees.

Argued Nov. 21, 1991

Decided April 30, 1992

Amos Perrine, Columbia Gas Transmission Corp., Charleston, W.Va., David D. Noble (argued and briefed), John E. Sullivan, III, Noble & Sullivan, Cleveland, Ohio, for Columbia Gas Transmission Corp.

M. Howard Petricoff (argued and briefed), Vorys, Sater, Seymour & Pease, Columbus, Ohio, for Matthew Kim McCullough and Luann McCullough.

Robert J. Reynolds, Reynolds & Richard, Wooster, Ohio, for Federal Land Bank of Louisville.

Joanne Spiglemire, Wooster, Ohio, for Joanne Spiglemire.

M. Howard Petricoff, Joseph M. Brooker, Vorys, Sater, Seymour & Pease, Columbus, Ohio, for Universal Exploration, Inc.

Before: JONES and MILBURN, Circuit Judges; and ENGEL, Senior Circuit Judge.

NATHANIEL R. JONES, Circuit Judge.

On April 14, 1988, Columbia Gas Transmission Corporation filed suit in the United States District Court for the Northern District of Ohio in Akron seeking to appropriate an exclusive underground natural gas storage easement beneath 264 acres of land in Wayne County, Ohio. Columbia Gas commenced this action pursuant to its eminent domain authority conferred in § 7(h) of the Natural Gas Act. *See* 15 U.S.C. § 717f(h) (1988).[1] The tract in question is part of a farm owned by defendants Matthew and Luann McCullough.[2] In the present appeal, Columbia Gas challenges the judgment below directing it to pay compensation to defendants in the amount of $213,798. This appeal requires us to address whether this circuit should develop a federal common-law rule as the standard of valuation, or rather, whether the Act requires that we adopt the law of the state in which the property

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[1] The parties agree that Columbia Gas falls within the provisions of 15 U.S.C. § 717f(h) and, accordingly, had the right to appropriate the easement. This circuit has held that an operator of a federally certified underground gas storage field has the right to condemn underground gas storage easements. *Columbia Gas Transmission v. Exclusive Gas Storage Easement*, 776 F.2d 125, 129 (6th Cir.1985).

[2] Also appearing as codefendants are Federal Land Bank of Louisville, Ross McCullough, Jr., Phyllis G. McCullough, Joanne Spiglemire, and Universal Exploration, Inc. (collectively, "defendants").

is situated as the appropriate federal standard. For the reasons that follow, we hold that the federal standard should incorporate the law of the state in which the condemned property is located. Because the court below did not follow Ohio law in making its determinations, we reverse and remand for further proceedings.

I

Columbia Gas is a natural gas company falling within the provisions of the Natural Gas Act, 15 U.S.C. §§ 717-717w (1988). As part of its extensive interstate natural gas distribution and transportation system, Columbia Gas maintains numerous natural gas storage fields throughout the Northeast and Midwest. These storage fields are the remnants of earlier natural gas deposits that have since been depleted. During periods of low demand, Columbia Gas injects natural gas purchased elsewhere into the storage fields for later withdrawal during period of high demand.

The instant suit concerns the Wayne Storage Field in Wayne County, Ohio, located in a geologic stratum, or "horizon," known as the Clinton Formation. The Clinton Formation lies approximately 2800 to 3000 feet beneath the earth's surface and encompasses approximately 21,000 acres. The McCulloughs are owners in fee simple of a 399-acre farm in Wayne County on which they grow grain and raise livestock. Approximately 264 acres of the McCullough farm are located in the "buffer zone" of the Wayne Storage Field [3] and are the subject of the instant condemnation proceedings.

Prior to 1987, Columbia Gas held a series of limited-duration underground gas storage leases with the Mc-

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[3] The "buffer zone" is a concentric area 5000 feet in width comprising the area immediately within the outer perimeter of the boundary of the Field. The buffer zone allows for the margin of error in the determination of the reservoir boundary.

Culloughs. These leases granted Columbia Gas the exclusive right to use the Clinton Formation beneath the property as a barrier to prevent the escape of gas in the reservoir of the storage field. The final lease expired in 1987, and Columbia Gas and the McCulloughs were thereafter unable to settle on a new lease term. Instead, on March 1, 1988, the McCulloughs entered into a six-month term production lease with Branney Operating Company, which in turn formed a joint venture with Universal Exploration and Petro Evaluation Services. The lease gave Branney Operating the exclusive right to drill, produce, and market all recoverable oil and natural gas from under the McCulloughs' property in exchange for a one-eighth royalty of the proceeds from the sale of all oil and gas recovered, free of the costs of production.

On March 28, 1988, Branney Operating assigned all of its rights under the lease to Universal Exploration. After arrangements were well under way to secure the necessary capital and drilling permits, Columbia Gas filed the instant suit condemning the underground storage easement. Columbia Gas feared that defendants' drilling might destroy the permeability barrier containing the stored gas within the field. The effect of the condemnation was to deprive defendants of their right to prospect for oil and gas within and below the Clinton Formation.

The district court proposed the empanelling of a commission pursuant to Federal Rule of Civil Procedure 71A(h) to determine the amount of compensation owed defendants. Following a comment period during which both parties proposed instructions, the court appointed a three-person Rule 71A(h) Commission. On May 4, 1990, the court issued an order finalizing the instructions and granting leave to both parties to file objections.

At hearings before the Commission, defendants presented expert testimony suggesting that the wells slated for drilling might well prove productive. An expert also predicted that the present interest value of the expected

future net income from the proposed wells might reach as high as $873,802. Columbia Gas responded with expert testimony and evidence indicating that the marketplace value of the right to prospect for oil and gas in land comparable to that belonging to defendants was approximately $50 per acre, bringing the total value of the easement to $13,200. Columbia Gas also offered evidence that a fee simple interest in the subject tract, unencumbered by any easements, was worth no more than $154,200.

After two days of hearings, the Commission issued its report. The Commission found that "[i]t is more likely than not that commercially recoverable oil and gas reserves exist within the property sought to be appropriated." J.A. at 195. The Commission further found that "the present value, on the date of taking, of the net cash flow from the natural gas reserves from the property sought to be appropriated, discounted at twelve percent (12%), is . . . $305,426." *Id.* at 196. After discounting this amount by 30% due to its determination that the property would more likely than not be classified as "proved undeveloped" reserves, the Commission concluded that just compensation for the condemned property was $213,798. *Id.*

On January 22, 1991, after various post-report motions by both parties, the court ordered the Commission to supplement its report stating the evidentiary basis for its findings. On March 21, 1991, after receiving the Commission's supplemental report, the court upheld the Commission's findings of fact and conclusions of law. Columbia Gas subsequently filed this timely appeal.

II

Columbia's Gas's primary contention on appeal is that the Commission applied the improper legal standard in determining the amount of compensation due the defendants. Specifically, Columbia Gas argues that the Commission erred in relying upon the present value of the

expected future net income of the planned wells, rather than upon the difference in value of the subject property before and after the condemnation. Before addressing the merits of this claim, however, we must first determine whether this issue should be resolved in accordance with state law, in this case the law of Ohio, or under federal common law.[4]

Resolution of this issue follows the analysis set forth in *United States v. Kimbell Foods*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979), and its progeny. *Kimbell* involved the priority of competing private and federal liens, some of which arose under federal loan programs, in the absence of a federal statutory scheme setting priorities. *Id.* at 718, 99 S.Ct. at 1453. The Supreme Court first addressed whether the federal program required that federal law should govern and unequivocally held that it should:

> Since the agencies [that held the United States' liens] derive their authority to effectuate loan transactions from specific Acts of Congress passed in the exercise of a "constitutional function or power," their rights, as well, should derive from a federal source. . . . In such contexts, federal interests are sufficiently implicated to warrant the protection of federal law.

Id. at 726-27, 99 S.Ct. at 1457-58 (citation omitted) (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366, 63 S.Ct. 573, 574, 87 L.Ed. 838 (1943)).

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[4] Although neither party addressed this issue in its argument before this Court, both apparently assuming that federal common law provided the proper standard, we nevertheless recognize that we can, and indeed must, address this issue before proceeding to the merits of the dispute. *See Kamen v. Kemper Fin. Servs.*, —— U.S. ——, ——, 111 S.Ct. 1711, 1718, 114 L.Ed.2d 152 (1991) (holding that, despite party's failure to raise issue of whether state or federal law provided proper standard, court of appeals "was not free to promulgate a federal common law . . . rule without identifying the proper *source* of federal common law").

Given that federal law provided the source of power, the Court next addressed whether the federal courts should fashion a uniform federal common-law rule or adopt state law as the federal standard. *Id.* at 728, 99 S.Ct. at 1458. The Court enunciated three considerations guiding its analysis: (1) the need for a nationally uniform body of law, (2) whether the application of state law would frustrate specific objectives of the federal program at issue, and (3) the extent to which application of a federal rule would upset commercial relationships predicated on state law. *Id.* at 728-29, 99 S.Ct. at 1458-59; *accord Gaff v. Federal Deposit Ins. Corp.*, 919 F.2d 384, 387 (6th Cir.1990), *modified*, 933 F.2d 400 (6th Cir.1991). Reviewing each factor in turn, the Court concluded that state law should be adopted as the appropriate federal rule.

Since its decision in *Kimbell Foods*, the Supreme Court has reaffirmed the continuing vitality of the *Kimbell Foods* framework. In *Kamen v. Kemper Financial Services*, —— U.S. ——, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991), the Court considered whether federal courts should develop a federal common-law rule requiring a representative shareholder, in a derivative action pursued under the Investment Company Act of 1940, 15 U.S.C.A. §§ 80a-1 to 80a-64 (West 1981 & West Supp. 1991), to make a demand on the board of directors, even though such a demand would be excused as futile under state law. *Id.* at 1714. In a unanimous opinion, the Court first noted that, because the dispute turned on the requirements imposed under a federal statute, the contours of any rules necessary to fill in the gaps of that statute were "necessarily federal in character" and, therefore, governed by federal law. *Id.* at 1717. The Court added, however, that this was only the beginning of the inquiry:

> It does not follow, however, that the content of such a rule must be wholly the product of a federal court's own devising. Our cases indicate that a court should

> endeavor to fill the interstices of federal remedial schemes with uniform rules only when the scheme in question evidences a distinct need for nationwide legal standards, or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand. Otherwise, we have indicated that federal courts should "incorporat[e] [state law] as the federal rule of decision," unless "application of [the particular] state law [in question] would frustrate specific objectives of the federal programs." The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards.

Id. (citations omitted) (quoting *Kimbell Foods*, 440 U.S. at 728, 99 S.Ct. at 1458). Applying this reasoning to the case before it, the Court refused to displace the established state-law futility rule with a uniform federal rule and, consistent with *Kimbell Foods'* three-step inquiry, found that (1) there was no overriding need for a nationally uniform rule, (2) the futility exception was not inconsistent with the policies underlying the Investment Company Act, and (3) the scope of any demand requirement, federal or state, would necessarily embody the incorporating state's allocation of governing powers within the corporation. *Id.* at 1719-23.

This court has previously applied the *Kimbell Foods* analysis in choosing between state and federal common law in delineating the contours of federal statutes. *See, e.g., United States v. 2525 Leroy Lane*, 910 F.2d 343, 347 (6th Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1414, 113 L.Ed.2d 467 (1991). Taken together, this body of precedent suggests an inclination to adopt state law as the federal standard where a private party brings a federal cause of action implicating areas of traditionally

state concern. The narrow issue of whether compensation for a condemnation action brought pursuant to § 717f(h) of the Natural Gas Act should follow state law is, however, a matter of first impression in this circuit.

As an initial matter, we have no hesitation concluding, consistent with the threshold *Kimbell Foods* inquiry, that defining the contours of § 717f(h) is an issue of federal law. The Natural Gas Act is a federal statute implementing a nationwide federal program. Accordingly, its interpretation is a matter of federal law. *See Kamen*, 111 S.Ct. at 1717; *Kimbell Foods*, 440 U.S. at 726, 99 S.Ct. at 1457: Less obvious is whether, as a matter of federal law, this Court should fashion a federal common-law rule as the federal standard or instead, adopt the law of the state in which the condemned property is situated.

Our analysis begins with the statutory language. Section 717(h) provides that a private-party holder of a certificate of public convenience such as Columbia Gas may acquire a necessary easement

> by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. *The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated. . . .*

15 U.S.C. § 717f(h) (emphasis added). The statutory language explicitly provides that federal courts should look to the "practice and procedure" of the state in which the subject property is located in resolving the rights and obligations of parties to an eminent domain action brought under this section. Whether this language can be read as also necessarily incorporating the *substance* of state law rules for purposes of determining just compensation,

however, is arguably open to question. While we are inclined to read the statute as raising a strong presumption that state law does provide the proper measure for such determination, we nevertheless find it useful to look beyond the statute itself, to decisions of other circuits, for guidance.

To the best of our knowledge, only one court of appeals has directly addressed whether § 717f(h) incorporates state law as the appropriate federal standard. In *Mississippi River Transmission Corp. v. Tabor*, 757 F.2d 662 (5th Cir.1985), the Fifth Circuit summarily held that the statutory language of § 717f(h) required that state law be adopted as the federal rule. *See id.* at 665 n. 3. The court's summary treatment of this issue, however, is best understood in light of the Fifth Circuit's earlier decision in *Georgia Power Co. v. 138.30 Acres of Land (Sanders)*, 617 F.2d 1112 (5th Cir.1980) (en banc), *cert. denied*, 450 U.S. 936, 101 S.Ct. 1403, 67 L.Ed.2d 372 (1981). In *Georgia Power*, the court, sitting en banc, addressed whether to fashion a federal rule or adopt state law to determine the amount of compensation due where a private party exercises the power of eminent domain under § 21 of the Federal Power Act. *Id.* at 1113. In language materially identical to § 717f(h), the Federal Power Act, § 21, *see* 16 U.S.C. § 814 (1988), mandates that federal courts apply the "practice and procedure" of the state in which the condemnation occurs.[5]

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[5] 16 U.S.C. § 814 provides that a party exercising the right of eminent domain under the Federal Power Act may proceed

> in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated. . . .

16 U.S.C. § 814.

Relying on a long line of Supreme Court cases culminating in *Kimbell Foods*, the court first concluded that the source of the eminent domain power conferred under § 814 was federal. *Georgia Power*, 617 F.2d at 1115-18. The court then analyzed whether state law should be adopted as the appropriate federal standard. While noting "the existence of important federal interests . . . arising under the Federal Power Act," the court found these interests insufficient to warrant the displacement of state law. *Id.* at 1118. First, the court noted that the legislative history of the Federal Power Act revealed no express congressional intent that federal common law rather than state law supply the federal rule for determining compensation. Second, the court held that, because the project at issue was pursued by a private party, it "does not implicate the interests of the United States to the degree that it is thought desirable that the project be undertaken by the United States itself." *Id.* Third, the court noted that the incorporation of state law as the appropriate rule would not frustrate the "overriding federal interest at stake" in the case, which was "in implementing or effectuating the federal program." *Id.* at 1120.[6] The court also observed that a federal common-law rule would not necessarily advance the goal of national uniformity, reasoning that, because a licensee under § 814 often had the option of proceeding under state or federal law, application of a uniform federal standard "could result in a corresponding loss of uniformity even in a single project." *Id.* at 1122. Finally, the court noted that, "since the question of what constitutes property is usually determined with reference to state law," the state had a strong interest in the resolution of disputes over property rights. *Id.* at 1123. In light of these observations, the court concluded that the law of the state where

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[6] The court also held that, while the application of state law might result in higher costs to the condemnor, that possibility did not "amount[] to the kind of conflict which [would] preclude[] adoption of state law." *Id.* at 1121.

the condemned property is located was to be adopted as the appropriate federal rule for determining just compensation. *Id.* at 1124.

At least one other circuit has found *Georgia Power* persuasive and, accordingly, has adopted its analysis. *See National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1266-67 (2d Cir.) (adopting *Georgia Power* analysis, but finding that federal common law should govern Amtrak), *cert. denied*, 484 U.S. 954, 108 S.Ct. 347, 98 L.Ed.2d 373 (1987).[7] While we read *Georgia Power* as primarily an elaboration of the analysis propounded in *Kimbell Foods* and its progeny, we find it instructive to the case at bar and conclude that it points to the same result in this case as well.

A number of reasons support adopting state law as the federal standard for determining compensation under § 717f(h). First, property rights have traditionally been, and to a large degree are still, defined in substantial part by state law. *See* 36 C.J.S. *Federal Courts* § 189(5) (1960) ("As a general rule, legal interests and rights in property are created and determined by state law. . . . [Thus], the courts of the United States have appiled state law in cases involving . . . the power of eminent domain and its exercise. . . ."). Thus, regardless of the rule chosen in this case, it will invariably derive its essence and much of its practical import from how the parties' property rights have been carved out under state law and how the parties have previously allocated these state-defined property rights. Were we to fashion a federal common-law rule under § 717f(h), the rule, far from offering an analytically distinct and self-contained analysis, would at best merely superimpose a layer of property

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[7] In *United States v. 33.5 Acres of Land*, 789 F.2d 1396, 1400 (9th Cir.1986), the Ninth Circuit distinguished *Georgia Power* and refused to adopt its reasoning on the ground that the condemnor in its case was the United States rather than a private party.

right allocation onto the already well-developed state property regime. Such a result would carry with it the danger of upsetting the parties' commercial expectations founded upon state law.

Second, we are confident that incorporating state law as the federal standard will not frustrate the specific objectives of the Natural Gas Act. The Act declares its purpose as furthering the public interest "in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce." 15 U.S.C. § 717(a). The only conceivable effect that adopting state law as the measure of compensation might have on this purpose would be that condemnors proceeding under the Act might be required to pay more or less than under an alternative federal common-law rule. To the extent that compensation under state law might deviate from that under a federal rule, we believe this variance, in the aggregate, is far too speculative to warrant displacing state law. Furthermore, even if it could be shown that state law might result, on average and over time, in consistently greater or lesser awards, we seriously doubt that the amount would rise to the level of frustrating the specific objectives of the Natural Gas Act.

Third, we are unconvinced that fashioning a nationally uniform rule of compensation for private parties exercising their power of eminent domain under the Natural Gas Act is necessary in this case. Any advantages of a uniform rule are outweighed in this case by the considerations discussed above. Moreover, nothing in the statutory scheme of the Act "evidences a distinct need for nationwide legal standards." *Kamen*, 111 S.Ct. at 1717.

Finally, while we reserve deciding that the legislative history of the Act is a proper issue of concern under the *Kimbell Foods* analysis, we note that the legislative history of § 717f(h) suggests that it was intended to mirror the parallel provision of the Federal Power Act. *See* H.R.Rep. No. 695, 80th Cong., 1st Sess., *reprinted in* 1947

U.S.C.C.A.N. 1477, 1477. The court in *Georgia Power* concluded that the Federal Power Act's legislative history warranted the application of state law. 617 F.2d at 1118.

In sum, we conclude that, although condemnation under the Natural Gas Act is a matter of federal law, § 717f(h) incorporates the law of the state in which the condemned property is located in determining the amount of compensation due. Accordingly, we next consider whether the Commission below adopted a measure of compensation that conformed with the law of Ohio.

III

As a general rule, the correct measure of valuation of a partial taking of property is the difference between the property's fair market value immediately before and immediately after the taking. *See Powers v. Hazelton & L. Ry.*, 33 Ohio St. 429, 435 (1878); *American La. Pipe Line Co. v. Kennerk*, 103 Ohio App. 133, 3 O.O.2d 201, 144 N.E.2d 660, 665 (1957). Under Ohio law, mineral deposits are generally not subject to valuation separate and apart from the land in which they are located. *Board of Park Comm'rs v. DeBolt*, 15 Ohio St.3d 376, 15 OBR 494, 474 N.E.2d 317, 319 (1984). Thus, while "it is proper to admit evidence that the land contains valuable mineral deposits, . . . the award may not be reached by separately evaluating the land and the deposits." *Preston v. Stover Leslie Flying Serv. (In re Appropriation of Easements for Highway Purposes)*, 174 Ohio St. 441, 23 O.O.2d 100, 190 N.E.2d 446, 450 (1963). In *Preston*, the Ohio Supreme Court explained the reason for this rule as follows:

> The underlying basis for rejecting evidence of the value of minerals separate and apart from the overall value of the land is that it involves an estimation of the future profits to be derived from the mining and marketing of such minerals. This is in accordance

> with the established principle in Ohio that evidence of damages by way of loss of profits is too speculative in character.

Id. 190 N.E.2d at 450; *see also DeBolt*, 474 N.E.2d at 319 (noting that "the loss of future profits to be derived from a commercial venture operated upon appropriated land is generally not subject to reasonable accurate proof"). The *Preston* court qualified its holding by noting that recovery of future profits might be permitted "if proved with reasonable exactitude," but that such recovery was allowable only where the evidence "is of such a character as to take the determination of damages out of the field of speculation." 190 N.E.2d at 451. As a result, the court found that the trial court erred in instructing the jury that it could award compensation on the basis of expected future net profits for the minerals, *id.* at 453, and held that a condemnee is entitled only to the fair market value of his or her land, defined as "the price which would be agreed upon at a voluntary sale by an owner willing to sell to a purchaser willing to buy," *id.* at 452.

More recently, in *Board of Park Commissioners v. DeBolt*, the Ohio Supreme Court distinguished *Preston* to hold that a *contract* for timber located on appropriated land constitutes a distinct asset and is subject to separate valuation apart from the land on which the timber is situated. *DeBolt*, 474 N.E.2d at 319. The court based its holding on the principle that a party is entitled to compensation for the value of a contract where "the contract rights of the party seeking compensation flow[] directly from its interest in the property which was taken." *Id.* Thus, where a party does not hold a "direct interest in the *res* which was taken," the party is not entitled to compensation. *Id.* at 319-20. The court also seemed swayed by the fact that the timber in this case was readily capable of reasonably precise calculation, thus removing it from the rationale underlying the general

rule refusing valuation of minerals, that "the determination of the market value of such items is too dependent upon speculation on [sic] future events." *Id.* at 319.

We are inclined to believe that the facts of the instant case lie somewhere between the general before-and-after rule of valuation and the exception articulated in *DeBolt*. The McCulloughs entered into a contract with Branney Operating for the recovery and sale of oil and gas deposits on their land, for which the McCulloughs were to receive a one-eighth royalty of net profits. By frustrating the McCulloughs ability to access these reserves, Columbia Gas appropriated their contract rights, which were tied directly to the condemned property. On the other hand, the precise value of the contract turning as it did on expected future income from the projected wells, seems substantially more speculative than the timber contract at issue in *DeBolt*, thus arguably placing the contract within the general rule announced in *Preston*. Moreover, it is unclear whether *DeBolt* would require compensation for Universal Exploration's interest in the contract, as its contract rights arguably did not flow directly from a property interest that it held in the condemned property.

Where precisely this case falls, however, is an issue we conclude is best resolved below, as we find that a remand is necessary on the ground that the Commission failed to apply the law of Ohio. In its instructions to the Commission, the district court submitted four alternative methods according to which the Commission could determine the fair market value of the easement. Although the court instructed that the Commission could determine compensation based on "the difference in the fair market value of the entire condemned tract before and after the taking," J.A. at 120, the court also instructed the Commission, over the objection of Columbia Gas, that it was equally free to award defendants the present value of the expected future net income of the proposed wells for their productive lives, *id.* at 119 ("[I]n fixing just compensation,

you would determine the probable revenues and costs for the production and sale of native natural gas from the condemned tract and reduce the net sales value by the interest the landowners will enjoy for an early, one time payment."). In addition, the instructions gave no indication that an award under the latter method might be inappropriate if the reserves were unreasonably speculative, nor did they clarify that only the McCulloughs, and not Universal Exploration, might be entitled to compensation for the value of the contract.

Upon review, we conclude that these instructions were insufficient as a matter of law. The instructions did not inform the Commission, in accordance with Ohio law, that a condemnee may ordinarily not be compensated merely on the basis of expected future profits that might be realized from the mining and marketing of mineral deposits located on his land. *Preston*, 190 N.E.2d at 450. Moreover, the instructions failed to clarify that the McCulloughs were entitled to compensation for their contract with the drilling companies only if the value of the contract was not dependent upon uncertain future events. *DeBolt*, 474 N.E.2d at 319. Finally, the instructions failed to alert the Commission that, even if the contract was capable of sufficiently precise valuation, only those defendants whose contract rights flowed directly from their interest in the condemned easement were entitled to compensation. *Id.* at 319-20.

Our review of the record also supports a remand. Columbia Gas presented essentially uncontested expert testimony that the right to prospect for oil and gas on land comparable to the subject parcel was valued at no greater than fifty-three dollars per acre. Given that Columbia Gas condemned an easement under 264 acres of the McCulloughs farm, this suggests that the diminution in value of the land flowing from the easement was approximately $13,992, far less than the $213,798 awarded by the Commission.

Columbia Gas also offered unchallenged evidence that the fair market value of the 264 acres of land under which the easement was located did not exceed $154,200. Naturally, defendants' failure to rebut this evidence may well have rested on their mistaken assumption that they were entitled to present value of expected future income from the proposed wells. Thus, rather than modify the amount awarded below, we believe that a new trial is necessary to give the parties a full and fair opportunity to present evidence in accordance with Ohio law.

As a final matter, Columbia Gas raises a number of challenges to the Commission's factual findings, and argues that the Commission failed to state adequately the basis for its findings. Given our conclusion that legal errors in the instructions to the Commission mandate a new trial, it is not necessary for us to reach these issues.

IV

For the foregoing reasons, we REVERSE the judgment below, VACATE the award of $213,798 to defendants, and REMAND for a new trial consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-3360

COLUMBIA GAS TRANSMISSION CORPORATION,
Plaintiff-Appellant,

v.

AN EXCLUSIVE NATURAL GAS STORAGE EASEMENT IN THE CLINTON SUBTERRANEAN GEOLOGICAL FORMATION BENEATH A 264.12 ACRE PARCEL IN PLAIN TOWNSHIP, WAYNE COUNTY, OHIO; MATTHEW KIM MCCULLOUGH; LUANN MCCULLOUGH; FEDERAL LAND BANK OF LOUISVILLE; ROSS MCCULLOUGH, JR.; PHYLLIS G. MCCULLOUGH; JOANNE SPIGLEMIRE, TREASURER; UNKNOWN INTERESTED OTHER PARTIES TO PLAINTIFF; UNIVERSAL EXPLORATION, INC.,
Defendants-Appellees.

Before: Jones and Milburn, Circuit Judges;
Engel, Senior Circuit Judge

JUDGMENT

[Filed Apr. 30, 1992]

ON APPEAL from the United States District Court for the Northern District of Ohio at Akron.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is reversed. IT IS

FURTHER ORDERED that the award of $213.798 to the defendants is vacated, and the case is remanded for a new trial consistent with the opinion.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

A True Copy.
Attest:

/s/ Valerie Fields
Deputy Clerk

Issued as Mandate: July 31, 1992

COSTS: None

Filing Fee ..... $
Printing ..... $

Total ..... $

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C88-0936A

COLUMBIA GAS TRANSMISSION CORP.,
Plaintiff,

vs.

AN EXCLUSIVE UNDERGROUND NATURAL GAS STORAGE EASEMENT IN THE CLINTON SUBTERRANEAN GEOLOGICAL FORMATION, (MCCULLOUGH), *et al.*,
Defendants.

MEMORANDUM OPINION

I. INTRODUCTION.

This action was brought by the plaintiff to obtain an exclusive underground natural gas storage easement in the Clinton Subterranean Geological Formation under the 264.12 acre parcel of the property owners Matthew and LuAnn McCullough. The property is located in Plain Township, Wayne County, Ohio. The law is now settled that the plaintiff has the power of eminent domain with respect to the easement sought.[1] The property owner is entitled to just compensation. Experience with several jury trials has suggested that the task of setting just compensation is quite difficult for a jury because of the somewhat mysterious nature of attempting to determine

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[1] *See Columbia Gas Transmission Corp. v. Easement*, 578 F. Supp. 930 (N.D. Ohio 1984).

(without the benefit of drilling a well)[2] the extent that native natural gas is stored under the premises and for which the easement to store natural gas shipped from other areas is being sought. One thing is certain. When the easement is granted by the use of eminent domain powers, the property owner will have no future right to drill for the native gas and recover it.

Experienced counsel represent the parties in this action. They suggested and agreed that a commission of three persons trained in the nuances of natural gas and oil exploration and created by the Court under the authority of Civil Rule 71A would be a preferable method of determining the value of the condemned easement. The Court created such a commission. The Court adopted an order to guide the functioning of the Commission and assigned this case to the Commission. The Commission conducted hearings for two days on May 10 and 11, 1990 in a courtroom in the United States District Court in Akron.[3]

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[2] Counsel for the parties in this case have wrestled with the Court on the many issues involving the underground storage of natural gas. At one time counsel agreed to the appointment of a Court's expert to assist in determining value of the acquired easement. After considerable effort was given by the Court and counsel to obtain an expert in the field of exploration and development of natural gas wells, a well qualified professor was designated as the Court's expert. That effort was ill fated. The expert eventually recommended that a separate test well be drilled into the Clinton formation so that there would be actual proof as to the existence of native gas under the property in question. Obviously, such an expense might very well provide a definitive answer, but the cost would exceed in all likelihood the value of the easement. Consequently, the attempt to have a Court's expert was eventually abandoned.

[3] The testimony developed a two-volume transcript of 440 pages. The plaintiff presented forty-eight separate exhibits and the defendant approximately twenty exhibits. Furthermore, in an attempt to streamline the hearing, the parties prepared transcripts of direct prepared testimony and that information was shared

The Commission's report was filed on October 25, 1990 (docket #87) and included the recommendation that the plaintiff pay as just compensation for the easement the sum of $213,798.00. The initial report contained findings of fact and conclusions of law. A copy of the initial report is attached as Appendix #1.

The plaintiff appropriating authority filed timely objections to the report and urged the Court to either reject the report or, in the alternative, reduce the amount of the award to the sum of $13,200.00. The property owners filed a response urging the Court to adopt the report of the Commission.

The Court by order filed on January 22, 1991 (docket #101) instructed the Commission to elaborate on its findings of fact. On February 28, 1991 the Commission filed a supplemental report, a copy of which is attached as Appendix 2.

The plaintiff filed a supplemental objection on March 8, 1991 and renewed its objection to the report of the Commission, arguing that its decision was outside the record in that neither party's position as presented has been adopted and that therefore the report should be rejected or, in the alternative, the award reduced to the sum of $13,200.00.

Rule 71A(h) with respect to the use of a commission in appropriation cases provides in part:

> If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the

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with the commissioners and opposing counsel prior to the two-day hearing. In sum, the presentation by the parties was thorough and exhaustive. Had the same type of information been presented to a jury of laymen as opposed to the commissioners, each of whom was well versed in the area of oil and gas, the trial may well have required five or six days of testimony.

provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of the subdivision (e) of Rule 53.

Rule 53(e)(2) provides that the findings of fact of the master (commission) shall be accepted unless clearly erroneous. The Court has reviewed the findings of fact as supplemented and rejects the plaintiff's view that they are clearly erroneous. In sum, the Commission determined through its explicit fact findings that the value of the easement was greater than claimed by the plaintiff and less than the claim of the property owner. Implied in the plaintiff's objections is the notion that the commission of experts in the field has to adopt one of the two positions.

No such rule applies to the jury in fixing value in an eminent domain case and the Court rejects the idea that such a proposition binds the commission.

The objections of the plaintiff are overruled and the Court will publish a judgment entry awarding the property owners compensation in the sum of $213,798.00.

AWARD OF FEES TO THE COMMISSIONERS

The Commissioners, Terrence Kessler, Guy Sitler and Walter Fox, have submitted separate bills for services and costs. *See* dockets # #91-107.

Mr. Terrence Kessler, a partner in the law firm Black, McCuskey, Souers and Arbaugh of Canton, and Chairman of the Commission, has submitted an invoice as supplemented for $6,378.90 which includes fees in the sum of $6,245.00 and costs of $133.90. Mr. Kessler indicates a total of 64.8 hours.[4] Mr. Guy Sitler, the owner of an oil

[4] Mr. Kessler's bills indicate that 17 hours of the time claimed were performed by Mr. Kessler's associates at a lower rate than the $110 an hour that Mr. Kessler claims.

and gas business in Newark, Ohio, has submitted an invoice for $9,079.91 based on 69.7 hours [5] at the rate of $125 an hour and costs of $367.41. Mr. Walter Fox, a Petroleum and Natural Gas Consultant, has submitted an invoice of $19,544.05 for 122.5 hours at $150 an hour plus cost in the sum of $1,169.05.

One of the attacks leveled against the work of the Commission by Columbia is the claim that the Commissioners violated the Court's order regarding the performance of their duties and engaged in their own investigation, aside from the information provided by the testimony. However, an examination of the voluminous materials submitted to the Commission by counsel during the lengthy two-day hearing demonstrates that extensive work following the hearing was appropriate to develop the fact findings and the basis for the award.

The Court finds that the hours claimed by both Mr. Kessler and Mr. Sitler are reasonable. However, the Court finds that the hours claimed by Mr. Fox are excessive. The Court will limit his hours to 10 in excess of the number claimed by Mr. Sitler, i.e., 78.1 hours. The Court fixes the rate of compensation for each of the three commissioners at $110 an hour.[6]

In summary, the applications for fees and costs are approved as follows:

1. Mr. Kessler's application is approved as submitted for a total of $6,378.90 for fees and costs.

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[5] The invoice itemized Mr. Sitler's time on an hourly basis. However, the Court finds that Mr. Sitler's time sheets total only 68.1 hours as opposed to 69.7 as claimed.

[6] The Court appreciates the willingness of the commissioners to accept the assignment and to devote the time necessary to reach a determination. Fixing rates for services is always a difficult task. However, in this situation, the Court is of the view that the hourly rate claimed by Mr. Kessler is reasonable and should constitute the standard for determining the rate for the other two commissioners.

2. Mr. Sitler's application is approved for fees in the sum of $7,491.00 and costs in the sum of $367.41 for a total of $7,858.41.

3. Mr. Fox's application is approved for fees in the sum of $8,701.00 and costs in the sum of $1,165.05 for a total of $9,870.05.

The court anticipates that the plaintiff will file an appeal and that the appellate process will take twelve to eighteen months. The payment of the commissioners should not be delayed by the appellate process. The plaintiff is directed to pay the commissioners the approved amounts within twenty days of the Court's order and then, when paying the award to the property owner, the plaintiff shall be entitled to deduct fifty percent of the cost of the payment to the commissioners from the award as paid to the property owners, so that in the final analysis the fees and costs of the commissioners will be shared equally by the parties.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-3360

COLUMBIA GAS TRANSMISSION CORPORATION,
Plaintiff-Appellant,

v.

AN EXCLUSIVE NATURAL GAS STORAGE EASEMENT in the CLINTON SUBTERRANEAN GEOLOGICAL FORMATION BENEATH A 264.12 ACRE PARCEL IN PLAIN TOWNSHIP, WAYNE COUNTY, OHIO; MATTHEW KIM MCCULLOUGH; LUANN MCCULLOUGH; FEDERAL LAND BANK OF LOUISVILLE; ROSS MCCULLOUGH, JR., PHYLLIS G. MCCULLOUGH; JOANNE SPIGLEMIRE, TREASURER, UNKNOWN INTERESTED OTHER PARTIES TO PLAINTIFF; UNIVERSAL EXPLORATION, INC.,
Defendants-Appellees.

ORDER

[Filed Jul. 23, 1992]

BEFORE: JONES and MILBURN, Circuit Judges; and ENGEL, Senior Circuit Judge.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C88-0936A

COLUMBIA GAS TRANSMISSION CORP.,
Plaintiff,

vs.

AN EXCLUSIVE UNDERGROUND NATURAL GAS STORAGE EASEMENT IN THE CLINTON SUBTERRANEAN GEOLOGICAL FORMATION, (McCULLOUGH), *et al.*,
Defendants.

JUDGMENT ENTRY

DOWD, J.

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the plaintiff shall pay to the property owners Matthew and LuAnn McCullough the sum of $213,798.00 as just compensation for the exclusive underground natural gas storage easement under the 264.12 acre parcel of the McCulloughs located in Plain Township, Wayne County, Ohio.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the commissioners, Terrence Kessler, Guy Sitler and Walter Fox shall be awarded compensation for their fees and costs in serving as the commissioners in the following sums:

1. Mr. Terrence Kessler the sum of $6,378.90.
2. Mr. Guy Sitler the sum of $7,858.41.

3. Mr. Walter Fox the sum of $9,870.05.

The fees and costs of the commissioners shall be shared equally by the plaintiff and the property owners Matthew and LuAnn McCullough.

The plaintiff is directed to pay the commissioners the above sums within twenty days of the filing of this Judgment Entry and then deduct from the award paid to the McCulloughs fifty percent of the total cost of the fees and costs paid the commissioners.

Each party shall bear its own costs.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C88-0936A

COLUMBIA GAS TRANSMISSION CORP.,
Plaintiff,

vs.

VARIOUS UNDERGROUND NATURAL GAS STORAGE EASEMENTS, *et al.*,
Defendants.

ORDER

[Filed Jan. 22, 1991]

On May 10-11, 1990, hearings were held before the Court-appointed Rule 71A Commission. On October 25, 1990, the Commission issued its report with twelve separate fact findings. The Court requests that the Chairman of the Commission, Mr. Terrance Kessler, supplement the report by including citations to evidence in the record to support the conclusions contained in the Commission's report.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Nos. C85-2194, C86-1196A, C87-1388, C87-2677, C87-2678, C87-2679, C87-2680, C87-2681, C87-2682, C87-3348, C88-936A, C88-963A, C88-964A, C88-2933A, C88-2934A, C88-2935A, C88-3939

COLUMBIA GAS TRANSMISSION CORP.,
Plaintiff,

vs.

VARIOUS UNDERGROUND NATURAL GAS STORAGE EASEMENTS, *et al.*,
Defendants.

ORDER

[Filed May 10, 1990]

Pursuant to the Court's Order of May 4, 1990, counsel for the parties have filed their various objections to the Instructions to the Rule 71(A)(h) Commission adopted by the Court. The Court has considered the objections filed and they are overruled.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Nos. C85-2194, C86-1196A, C87-1388, C87-2677, C87-2678, C87-2679, C87-2680, C87-2681, C87-2682, C87-3348, C88-936A, C88-963A, C88-964A, C88-2933A, C88-2934A, C88-2935A, C8-3939

COLUMBIA GAS TRANSMISSION CORP.,
Plaintiff,

vs.

VARIOUS UNDERGROUND NATURAL GAS STORAGE EASEMENTS, *et al.*,
Defendants.

ORDER

[Filed May 4, 1990]

Counsel for the parties in the above-captioned case have filed proposed instructions to the Rule 71(A)(h) Commission and their memorandum in support of those proposed instructions. After consideration of those proposed instructions and the memorandum in support, the Court adopts the Instructions to the Rule 71(A)(h) Commission filed contemporaneously with this Order. Counsel are granted leave until May 9, 1990, to file any objections they may have to the Instructions adopted by the Court according to this Order.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Numbers:
C85-2194 C86-1196A C87-1388 C87-2677 C87-2678
C87-2679 C87-2680 C87-2681 C87-2682 C87-3348
C88-936A C88-963A C88-964A
C88-2933A C88-2934A C88-2935A

COLUMBIA GAS TRANSMISSION CORP.,
Plaintiff,

vs.

EXCLUSIVE NATURAL GAS EASEMENTS,
Defendants.

ORDER

[Filed Oct. 4, 1989]

On August 25, 1989, the Court published an order acknowledging the receipt from counsel of a recommendation for the procedures to be followed with respect to the Rule 71A commission appointed to decide the just compensation issues in the above-captioned cases. The Court invited objections to the recommended procedures, any objections to be made by September 11, 1989. The Court notes that no objections have been filed as of this date. Accordingly, the Court approves and adopts the recommended procedures to be followed with respect to the Rule 71A commission. Counsel are directed to contact Mr. Kessler to make the necessary arrangements to conduct the hearings for *Columbia Gas Transmission Corp. v. James, et al.* (Case No. C85-2194A and *Columbia Gas Transmission Corp. v. McCullough, et al.* (Case No. C88-0936A).

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Numbers:
C85-2194 C86-1196A C87-1388 C87-2677 C87-2678
C87-2679 C87-2680 C87-2681 C87-2682 C87-3348
C88-936A C88-963A C88-964A C88-2933A
C88-3939 C88-2934A C88-2935A

COLUMBIA GAS TRANSMISSION CORP.,
Plaintiff,

vs.

VARIOUS UNDERGROUND NATURAL GAS STORAGE EASEMENTS, *et al.*,
Defendants.

ORDER

[Filed Jul. 27, 1989]

By previous Order, this Court indicated its intention to resolve the issues of just compensation with respect to the condemnations in the above-captioned cases by means of a Rule 71A commission. Towards that end, the Court submitted questionnaires to five proposed commissioners for responses. Four of the proposed commissioners have returned the completed questionnaires to the Court. The Court has examined the completed questionnaires and finds nothing in the responses which would disqualify any of the four from service on the commission. Accordingly, the Court appoints Walter F. Fox, Jr., Terrence P. Kessler, Guy F. Sitler, and John N. Teeple to serve on the Court's Rule 71A commission.

The Court further appoints Walter F. Fox, Jr., Terrence P. Kessler, and Guy F. Sitler to serve on the first panel. Mr. Kessler shall serve as the chairman of the panel. Counsel are granted leave until August 4, 1989 to file any objections they may have to the appointment of this panel.

The following two cases will be assigned to the above-named panel for resolution: 1) *Columbia Gas Transmission Corp. v. James, et al.* (Case No. C85-2194A); and 2) *Columbia Gas Transmission Corp. v. McCullough, et al.* (Case No. C88-0936A).

Counsel shall submit to the Court by August 11, 1989, a stipulated recommendation concerning the procedures by which the panel will conduct itself. After such a procedure is approved by the Court, counsel shall directly contact Mr. Kessler to make the necessary arrangements to conduct the hearings for the two above-named cases.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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COLUMBIA GAS TRANSMISSION CORP.,
Plaintiff,

vs.

VARIOUS UNDERGROUND NATURAL GAS STORAGE EASEMENTS, *et al.*,
Defendants.

ORDER

[Filed June 19, 1989]

Before the Court is a motion by Columbia Gas Transmission Corporation ("Columbia") for the reconsideration of the Court's May 23, 1989, Order insofar as that Order sustains all objection of M. Howard Petricoff, counsel for certain defendants, to Columbia's proposed instructions to the Commission to be appointed by the Court pursuant to Rule 71A of the Federal Rules of Civil Procedure. In the alternative, Columbia moves the Court for an order finding that the May 23, 1989, Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order would materially

advance the ultimate termination of the litigation pursuant to 28 U.S.C. § 1292(b).

A. *Motion for Reconsideration.*

The parties in the above-captioned cases extensively briefed their position with respect to the proposed instructions for the commissioners. The Court also conducted a status conference by phone with Mr. Noble and Mr. Petricoff to discuss this matter. Upon Columbia's motion for reconsideration, the Court again reviewed the parties' briefs and, in addition, reviewed the instructions the Court had given the jury in a condemnation case previously before this Court that was tried to a jury.

Columbia Gas Transmission Corp. v. An Exclusive Gas Storage Easement, etc., et al. (Case No. C84-510A) and *Maxine Bowman v. Columbia Gas Transmission Corp.* (Case No. C85-1524A) were tried together in this Court before a jury. The first case involved a condemnation proceeding by Columbia against the Bowman property, and the second case involved a trespass action by Mrs. Bowman against Columbia. The issues in Columbia's condemnation action in C84-510A with respect to burden of proof and just compensation are the same as the condemnation issues in the above-captioned cases.

Columbia's motion for reconsideration focuses on the Court's instructions with respect to the burden of proof on the landowners and the determination of just compensation.

1. *Burden of Proof on Landowners.*

On page 4, ¶ 1 of the Court's instructions to the Commissioners, the burden of proof of the landowner is addressed. That instruction currently reads as follows:

> 1. *Burden of proof.* The burden of proof is on the property owner to establish by preponderance of the evidence the amount of just compensation to

which he is entitled. Once the landowner has offered such it then must be refuted by Columbia. A fair preponderance of the evidence does not necessarily mean the greater in number of witnesses, but rather the greater weight of the evidence in terms of reliability and credibility. The test is not which side brings the greater number of witnesses or presents the greater quantity of evidence, but which witnesses and which evidence appears to be more reasonable and trustworthy. You must rule solely from the evidence that is presented to you.

Upon reconsideration, the Court finds that the instruction to the commissioners with respect to the burden of proof on the landowners should be modified to read as follows:

1. *Burden of Proof.* The burden of proof in a condemnation proceeding is upon the property owner to establish the amount of just compensation for the storage easement taken from them. In order for the property owner to successfully carry the burden of proof, it is necessary that they establish the amount of just compensation by a preponderance of the evidence. This means such evidence, as when weighed with that opposed to it, has more convincing force—is more probably true than not. A preponderance of the evidence does not require absolute certainty, and it is proper to find that a party has succeeded in carrying his burden of proof if you believe the evidence favoring his side of the question is simply more convincing than the evidence favoring the other side. The test is not which side brings the greater number of witnesses or presents the greater quantity of evidence, but which witnesses and which evidence appears to be more reasonable and trutsworthy. You must rule solely from the evidence that is presented to you.

2. *Determination of Just Compensation.*

The Court has carefully reconsidered its instructions to the Commissioners with respect to the use of fair market value to determine just compensation, and concludes that there is no error in this portion of the instructions. Accordingly, Columbia's motion for reconsideration of the Court's instructions to the Commissioners on the issue of just compensation is denied.

B. *Motion for Findings Necessary for an Interlocutory Appeal.*

28 U.S.C. § 1292(b) provides that

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

The Court's decision as to the instructions to be submitted to the Rule 71A commissioners for the above-captioned cases is not a final appealable order, and Columbia's only chance of reaching the circuit on this issue at this time is through an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). An appeal to the circuit pursuant to § 1292(b) requires that the district

court come to certain conclusions so advanced in writing. The Court concludes Columbia's contentions that the Court's instructions to the commissioners involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation is not well taken. Accordingly, Columbia's motion for findings necessary for an interlocutory appeal is denied.

CONCLUSION

For the reasons discussed above, the Court grants Columbia's motion for reconsideration with respect to the burden of proof on the landowners and denies Columbia's motion for reconsideration with respect to the issue of just compensation. Mr. Noble and Mr. Petricoff are hereby directed to make the above-indicated changes in the instructions to the Commissioners, and file the revised instructions for the above-captioned cases.

Columbia's motion for findings necessary for an interlocutory appeal is denied.

Lastly, the Court observes that on page 2 of the instructions the Court's deputy's last name is misspelled. The correct spelling is "Leaver." The Court requests that Mr. Noble and Mr. Petricoff make this correction in addition to the other changes contained in this Order.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Numbers: C85-2194 C86-1196A C87-1388
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C88-2933A C88-2934A C88-2935A C88-3939

COLUMBIA GAS TRANSMISSION CORP.,
Plaintiff,

vs.

VARIOUS UNDERGROUND NATURAL GAS STORAGE EASEMENTS, *et al.*,
Defendants.

ORDER

[Filed Jun 1, 1989]

The Court has this date, June 1, 1989, caused to be mailed to each of the five prospective commissioners, as previously designated in the Court's order of March 24, 1989, the attached letters and questionnaire.[1] The Clerk is directed to file this order and attachments in each of the above-described cases.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

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[1] The questionnaire and sufficient copies to mail to each commissioner has been delivered to the Court by Mr. Noble as previously requested by the Court. The questionnaire submitted to the prospective commissioners does not include Mr. Noble's certificate of service.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Numbers: C85-2194 C86-1196A C87-1388
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COLUMBIA GAS TRANSMISSION CORP.,
Plaintiff,

vs.

VARIOUS UNDERGROUND NATURAL GAS STORAGE EASEMENTS, *et al.*,
Defendants.

ORDER
[Filed May 23, 1989]

I. INTRODUCTION.

The Court has for consideration the proposed questionnaire to be submitted to the prospective Rule 71A(h) Commissioners to be appointed for the purpose of determining the value of the underground natural gas storage easements which the plaintiff is moving to condemn in the above-named cases. Counsel for the plaintiff has submitted a proposed questionnaire and the Court has considered the objections to the questionnaire. Additionally, David Noble on behalf of the plaintiff and Howard Petricoff on behalf of the defendant owners have conferred and prepared proposed instructions for the commissioners and noted the extent to which they have been unable to agree and have briefed the dispute. On May 22, 1989, the Court conferred by telephone with Mr.

Noble and Mr. Petricoff in connection with several concerns of the Court with regard to the proposed instructions for the commissioners.

Based upon the Court's study and conference with counsel, the Court orders as follows:

A. *Questionnaire*

The proposed questionnaire includes questions one through twenty-two. The Court approves questions 1, 4, 5, 6, 7, 8, 9, 10, and 11, and rejects the remaining questions. Mr. Noble is hereby requested to restructure and resubmit the questionnaire as modified to the Court so it may then submit the same to the commissioners for their response.

B. *The Proposed Instructions to the Commission.*

1. *The Court's Sua Sponte Modifications.*

The proposed instructions includes a topic entitled "Procedure." Section 5 is entitled "Hearings" and concludes with a sentence which declares: "A competent court reporter will be provided to report the evidence that you receive." That proposed sentence implies that a court reporter will be supplied by the Court. The Court will provide for a court reporter providing the hearing is conducted in Akron at the United States Courthouse and at a time when a court reporter is available. Consequently, when the proposed instructions are completed, the sentence "A competent court reporter will be provided to report the evidence that you receive" shall be modified by adding the clause, "providing a court reporter is available."

The proposed instructions also include a section entitled "Post Hearing Procedure." The first paragraph in subsection (1) reads as follows:

> 1. *Transcript.* All exhibits that are admitted into evidence should be retained by the court reporter for

ultimate filing with the Clerk of Courts at the time the transcript of proceedings is filed. When the hearings are completed, the court reporter shall prepare a transcript for filing with the Clerk of Courts, together with the exhibits, as expediently as possible. The parties may order copies of the transcript from the court reporter at the usual rates.

The Court, on its own motion, directs that that paragraph read as follows:

1. *Transcript.* All exhibits that are admitted into evidence shall be retained by the Court's courtroom deputy. Counsel of record will have the responsibility of filing the exhibits by way of an agreed order with the Court's courtroom deputy. If any party determines that it requires a transcript of the hearing conducted before the Commission, it shall be the responsibility of that party to order the transcript from the court reporter and make the necessary arrangements for the payment of the cost of the transcript.

The proposed instructions also contain a section entitled "Report of Commission." The Court directs that that section be modified to read as follows:

1. *Purpose and Content of the Report.*

The purpose of your report to the Court is to enable the Court to review your conclusions and the factual support for those conclusions. Your report should review the evidence presented, should state the standard or method of determining value that you applied in order to reach the conclusion of just compensation and should include findings of fact and conclusions of law justifying your determination of the just compensation to be awarded.

The Commission may, but it is not required to, submit a draft report to counsel for all parties for

the purpose of receiving their suggestions prior to filing its report with the Court. *See* Rule 53(e)(5) of the Federal Rules of Civil Procedure.

2. *The Court's Rulings on the Dispute Between Mr. Noble and Mr. Petricoff.*

The Court has reviewed the objections of Mr. Petricoff as have been highlighted in the documents submitted by Mr. Noble. The Court finds that each of the objections by Mr. Petricoff are well taken and are sustained.

It is apparent to the Court that Mr. Noble's word processor would seem to be the appropriate vehicle by which to put the instructions in final form. To that end, Mr. Noble is requested to re-write the instructions on the basis of the Court's ruling.

C. *Conclusion.*

The Court is scheduled to be in Cincinnati beginning August 7, 1989 for several weeks for the purpose of trying a case in the Southern District of Ohio. The Court is hopeful that the Commission and the parties will be able to schedule hearings on a number of the cases during that period. To assist in keeping such a schedule, the Court requests that Mr. Noble submit in revised form the questionnaire for the proposed Commissioners and the instructions for the Commissioners by Tuesday, May 30, 1989.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Numbers: C85-2194 C86-1196A C87-1388
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COLUMBIA GAS TRANSMISSION CORP.,
Plaintiff,

vs.

EXCLUSIVE NATURAL GAS EASEMENTS,
Defendants.

ORDER

[Filed Apr. 24, 1989]

On April 20, 1989, a status call was held for the above-captioned cases with counsel present and participating. The Rule 71A commission previously proposed by this Court as a method for resolving these cases was the main focus of discussion. The parties are granted leave until May 8, 1989, to provide the Court with a questionnaire to be submitted to the proposed commissioners, and are also granted leave until that date to brief their differences on the proposed instructions to the commission.

IT IS SO ORDERED.

s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Numbers: C85-2194 C86-1196A C87-1388
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COLUMBIA GAS TRANSMISSION CORP.,
Plaintiff,

vs.

EXCLUSIVE NATURAL GAS EASEMENTS,
Defendants.

ORDER

[Filed Mar. 24, 1989]

The Court published an order on March 14, 1989 requesting the parties to submit stipulated instructions for a commission to be appointed by the Court pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure to determine the just compensation for the underground natural gas storage easements appropriated by Columbia. The Court also indicated that it would gather "a group from which the three person commission" would be chosen.

In further examination of Civil Rule 71A(h), the Court notes that it calls for the appointment of a commission of three and not more than two additional persons to serve as alternate commissioners.

The Court has assembled a list of five persons from which it proposes to select three commissioners and two alternate commissioners.[1]

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[1] The Court is reluctant to label the five in the respective positions as commissioners and alternate commissioners in view of the

Rule 71A(h) provides that before appointing members of the commission and alternates, the Court shall advise the identity and qualifications of each prospective commissioner and alternate and may permit the parties to examine each such designee. The rule further provides that each party shall have the right to object for valid cause to the appointment of any person to the position of commissioner or alternate.

The Court proposes as prospective commissioners and alternates the following persons:

1. John Teeple, Attorney at Law, 401 Bank One Building, Alliance, Ohio, 44601. Mr. Teeple specializes in oil and gas law.

2. Terry Kessler, Partner, Law firm of Black, McCuskey, Souers & Arbaugh, 1000 United Bank Plaza, 220 Market Avenue, S., Canton, Ohio, 44702. Mr. Kessler has extensive experience in oil and gas law.

3. Robert Hutcheson, President, Canton Oil Well Service, Inc., 4580 Stephen Drive, NW, Canton, Ohio 44718. Mr. Hutcheson has extensive field experience in drilling and maintaining oil and gas wells.

4. Walter J. Fox, Petroleum and Natural Gas Consultant, P.O. Box 963, Wooster, Ohio, 44691. Mr. Fox has a Master of Engineering in Petroleum from the University of Oklahoma and an extensive background with various oil companies. Mr. Fox is an author of technical papers regarding the Clinton sandstone. His resume is attached as Appendix A.

5. Guy Sitler, Chairman of the Board of Stocker & Sitler, Inc. 575 Industrial Parkway, Heath, Ohio, 43056.

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likelihood that assembling a commission of three for any particular case or set of cases may require adjustments as to which commissioners, regular or alternate, would serve on any given case in view of the time constraints that the individual commissioners would have. In any event, the Court would propose to have either Mr. Teeple or Mr. Kessler preside, given their legal background.

Mr. Sitler has extensive experience with Stocker & Sitler in promoting, drilling and operating oil and gas wells.

If counsel for the parties have any objection to the appointment of any of the above named five, either in general or with respect to a specific case, said objections or the request for a hearing to examine one or more of the prospective designees is to be filed with the Court by April 14, 1989.

The Court hereby schedules a status call for counsel of record only in each of the above-named cases for April 20, 1989 at 12:30 p.m. at which time it will accept from counsel recommendations with respect to the selection of cases for presentation to the commission.

IT IS SO ORDERED.

s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Numbers: C85-2194 C86-1196A C87-1388
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COLUMBIA GAS TRANSMISSION CORP.,
Plaintiff,

vs.

EXCLUSIVE NATURAL GAS EASEMENTS,
Defendants.

ORDER

[Filed Mar. 14, 1989]

The above-captioned cases represent a group of cases in which Columbia Gas Transmission Corporation ("Columbia") seeks to appropriate natural gas storage easements in the Clinton formation. The issue for resolution is not whether these natural gas storage easements can be appropriated by Columbia, but what is appropriate compensation to the landowner's below whose property lies the storage easements.

Previously, the Court held two jury trials (C84-510A and C85-661A) to determine the issue of just compensation for the underground natural gas storage easements Columbia seeks. While that process resulted in an award of compensation, the Court and counsel determined from post-trial interviews that the jurors never fully understood the parties' positions nor the Court's instructions.

In an attempt to implement another process for assessing the value of these natural gas storage easements that would prove more satisfactory than the use of a jury, the Court appointed a neutral expert witness to evaluate the parties' positions in two cases with respect to existing natural reserves (C87-2680 and 87-2687), and file a report with the Court. While the expert appointed by the Court competently carried out his task, his report concerning existing natural reserves does not directly assess the value of the easements, nor are his determinations legally binding on the parties.

The Court now proposes that a Commission be appointed pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure to determine the just compensation for the underground natural gas storage easements appropriated by Columbia. Rule 71A(h) authorizes the Court, in its discretion, to appoint a three person commission to value condemned property. In memorandum submitted to the Court in response to its proposal to appoint a Rule 71A(h) commission, both parties responded affirmatively provided the Commission is composed of persons with experience in the oil and gas industry and legal training, and given appropriate instructions.

A phone conference with Howard Petricoff and David Noble was held on March 8, 1989, to discuss the Court's proposal and the parties' responses to it. While the Court goes about the business of gathering a group from which the three person commission shall be chosen, the parties shall compose stipulated instructions for the commission and submit them to the Court by April 3, 1989.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Nos. C85-2194 C86-1196A C87-1388
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COLUMBIA GAS TRANSMISSION CORP.,
Plaintiff(s),

vs.

EXCLUSIVE NATURAL GAS EASEMENTS,
Defendant(s).

ORDER

[Filed Feb. 10, 1989]

The Court is considering involving the provisions of Rule 71A of the Federal Rules of Civil Procedure and appointing a Commission to determine the value of the easements which Columbia Gas Transmission Corporation seeks to appropriate. Counsel of record are invited to comment on such a proposed procedure by March 7, 1989.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C88-0936A

Before the Rule 71A(h) Commission

COLUMBIA GAS TRANSMISSION CORPORATION,
Plaintiff,

vs.

AN EXCLUSIVE UNDERGROUND NATURAL GAS STORAGE EASEMENT IN THE CLINTON SUBTERRANEAN GEOLOGICAL FORMATION, (MCCULLOUGH), *et al.*,
Defendants.

SUPPLEMENTAL REPORT OF RULE 71A(h) COMMISSION

By order dated January 22, 1991, the Court has ordered the Chairman of the Commission to detail the basis for the factual findings set forth in the Report of the Commission dated October 25, 1990.

1. Finding of Fact #1 ("F #1"), regarding the ownership of the 264.12 acre parcel in Plain Township, Wayne County, Ohio, and Columbia Gas Transmission Corporation's seeking of an exclusive underground natural gas storage easement thereunder, is evidenced by the Complaint, Answer and Counterclaim in this case, together with the uncontroverted testimony of Matthew Kim McCullough at Transcript pages 36 and 37.

2. F #2, regarding the oil and gas lease to Branney Operating Company, is evidenced by Joint Exhibit No. 1.

3. F #3, regarding the assignment of the lease from Branney to Universal Exploration, Inc. is evidenced by Joint Exhibit No. 2.

4. F #4, regarding the ownership of the oil and gas interest in the property that Columbia seeks to appropriate is evidenced by Joint Exhibits Nos. 1 and 2.

5. F #5, regarding the presence of commercially recoverable oil and gas reserves in the property sought to be appropriated, is the ultimate fact determined by the Commission. Nearly all of the expert testimony presented to the Commission involved the issue of the presence or absence of oil and gas deposits under the premises. In making F #5, the Commission rejected the existence of the so-called "McCullough Bar" identified by Mr. Henthorne in his direct testimony, and likewise rejected the existence of a permeability barrier lying directly west of the McCullough property. Based upon the general testimony regarding the nature of the Clinton sandstone formation as a "blanket-sand" type formation, (see, for example, Henthorne Direct Testimony at pages 6 and 7, and Friend Direct Testimony at pages 3 and 4), and the abundance of evidence regarding the production history of the wells in the general vicinity (see Compendium) the Commission concluded that it was more likely than not that commercially recoverable reserves exist within the property sought to be appropriated. The Commission accepted Mr. Henthorne's and Mr. James' testimony that two (2) wells would be drilled to develop the reserves. (See, for example, Henthorne cross-examination at T. 84-85). The Commission determined that production of each of the wells would more likely than not approximate the median production from the wells in the sections surrounding the McCullough property. (See wells and production figures identified on Defendant Ex. C). The Commission calculated the median accumulated production from those wells to be 314,000 MCF of natural gas.

6. F #6, regarding the production curve of wells drilled to the reserves under the McCullough premises, is evidenced by the production curve of Key Well #19 as set forth in the Compendium. The Commission found that the accumulated reserves recovered from Key Well #19 were 136,000 MCF, and that, more likely than not, wells on the McCullough property having the same reserves, would have approximately the same production curve.

7. F #7, regarding the cost of two wells, is evidenced by the uncontroverted direct testimony of Mr. Henthorne (pages 14 and 15).

8. F #8, regarding the price at which gas would be sold, and the expenses relating to operating the wells, is evidenced a) by Mr. Henthorne's testimony regarding gas prices received by his company (Henthorne direct testimony, page 16), b) operating expenses incurred directly by the operator of $250 per month (Henthorne direct testimony, page 15) (The Commission found that operating costs incurred by third parties would add $50 per month to the operation's charges for extraordinary maintenance items), and c) severance and ad valorem taxes, evidenced by Mr. James' report submitted as Def. Exhibit I), Tables 4 and 5, and by the Commission's taking judicial notice of the severance tax rate charged in the taxing district in which the McCullough property is located).

9. F #9, regarding the constant level of gas prices and operating expenses, is based upon the absence of evidence offered to support any price or expense escalation formula.

10. F #10, regarding the discounted net cash flow, was calculated by the Commission utilizing the approach evidenced in Mr. James' direct testimony (Def. Ex. I, Tables 4 and 5), but utilizing as assumption the specific findings of the Commission regarding production, gas prices, operating expenses and taxes. The Commission applied a 12% discount factor to the net cash flow so calculated to deter-

mine a present value, as of the date of taking, of $152,713 per well, for a total present value of $305,426.

11. F #11, regarding an additional discount from the net discounted cash flow, is evidenced in Mr. James' testimony (Transcript pgs. 149-150) regarding the classification of the reserves as "proved undeveloped" and the discount factor applied regarding "proved undeveloped" reserves as between 10 and 50 percent. The Commission determined to apply a discount rate of 30%.

12. F #12, regarding just compensation represents the Commission's final calculation of the discounted present value of the cash flow from the property being appropriated.

Respectfully submitted,

/s/ Terrence P. Kessler
TERRENCE P. KESSLER
Chairman

Dated: February 27, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C88-0936A

Before the Rule 71A(h)
Commission

COLUMBIA GAS TRANSMISSION CORPORATION,
Plaintiff

-vs-

AN EXCLUSIVE UNDERGROUND NATURAL GAS STORAGE EASEMENT IN THE CLINTON SUBTERRANEAN GEOLOGICAL FORMTION, (MCCULLOUGH), *et al.*,
Defendants

REPORT OF THE COMMISSION

The Commission held a hearing on May 10 and 11, 1990, in the United States District Court at Akron, Ohio, at which time the Commission heard testimony from the property owner, Matthew Kim McCullough and from expert witnesses from the disciplines of petroleum engineering, geology, economics and real estate appraisal. Upon consideration of the tesimony presented at the hearing and upon consideration of the written briefs submitted by counsel for the parties, the Commission submits this Report to the Court pursuant to the instructions issued to the Commission.

Findings of Fact

1. Matthew Kim and LuAnn McCullough (collectively, "the McCulloughs") are the owners in fee simple of the 264.12-acre parcel in Plain Township, Wayne County,

Ohio of which Columbia Gas Transmission Corporation ("Columbia") seeks an exclusive underground natural gas storage easement in the Clinton Subterranean Geological Formation.

2. On March 1, 1988, the McCulloughs granted an oil and gas lease to Branney Operating Company on 400 acres, including the 246.12 acres which Columbia seeks to appropriate.

3. On March 28, 1988, Branney Operating Company assigned this oil and gas lease to Defendant Universal Exploration, Inc. ("Universal").

4. The McCulloughs and Universal own a combined one hundred (100%) of the oil and gas interest in the Clinton formation in the property that Columbia seeks to appropriate.

5. It is more likely than not that commercially recoverable oil and gas reserves exist within the property sought to be appropriated. The Commission finds, based upon the preponderance of the evidence presented to it, that two (2) Clinton wells would be required to economically develop the property and that the quantity of oil and gas which would more likely than not be recovered from two (2) wells drilled to the Clinton formation (both for landowner's use gas and for sale for commereial use) within the property sought to be appropriated is 314,000 MCF of natural gas.

6. The Commission finds that the natural gas so recovered would more likely than not be produced over a commercial life analogous to Key Well No. 19 submitted in Defendant's Exhibit F.

7. The Commission finds that two (2) wells drilled to recover the natural gas within the property sought to be appropriated would more likely than not cost the Defendants $170,000.

8. The Commission finds that gas produced from the wells drilled to the property sought to be appropriated

would more than likely not be sold at the price of $2.30 per MCF, and at a cost to the Defendants of $300 per month per well in operating expenses and an additional cost of 1.757078% of gross revenue for ad valorem and severance taxes.

9. Based upon the evidence presented to it, the Commission has not considered any escalation in gas prices or in operating expenses in reaching its conclusion as to value.

10. The Commission finds the present value, on the date of taking, of the net cash flow from the natural gas reserves from the property sought to be appropriated. discounted at twelve percent (12%), is $152,713 per well, for a total present value of $305,426.

11. The Commission finds that the natural gas reserves from the property sought to be appropriated would more likely than not be classified as "proved undeveloped" reserves, and that in determining fair market value, the total discounted cash flow would be further discounted by a factor of thirty percent (30%).

12. The Commission finds that the just compensation for the property being appropriated is $213,798.

Conclusions of Law

1. The fair market value of the property sought to be appropriated is that amount which a willing seller would realize and which a willing buyer would pay, both being fully informed as to the nature of the property .

2. The evidence presented by the Defendants proves, by a preponderance of the evidence, that there is commercially recoverable natural gas within the property sought to be appropriated.

3. The fair market value of the property sought to be appropriated must take into account the discounted net

cash flow resulting from the recovery of natural gas from the property sought to be appropriated.

Respectfully, submitted,

/s/ Terrence P. Kessler,
TERRENCE P. KESSLER
Chairman

/s/ Guy F. Sitler
GUY F. SITLER
Commissioner

/s/ Walter Fox
WALTER FOX
Commissioner

STATUTORY PROVISIONS

Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c):

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service

or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), Pub. L. No. 688, 75th Cong., 3rd Sess. (June 21, 1938), *as amended by* 56 Stat. 83 (1942), Pub. L. No. 444, 77th Cong., 2nd Sess. (Feb. 7, 1942).]

Section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f(h):

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. [61 Stat. 459 (1947), Pub. L. No. 245, 80th Cong., 1st Sess. (July 25, 1947).]

FEDERAL RULES OF CIVIL PROCEDURE

RULE 71A. CONDEMNATION OF PROPERTY

(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

(b) Joinder of Properties. The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) Complaint.

(1) *Caption.* The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) *Contents.* The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defend-

ants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) *Filing.* In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) Process.

(1) *Notice; Delivery.* Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) *Same; Form.* Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of the defendant's property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where the attorney may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

(3) *Service of Notice.*

(i) Personal Service. Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4(c) and (d) upon a defendant who resides within the United States or its territories or insular possessions and whose residence is known.

(ii) Service by Publication. Upon the filing of a certificate of the plaintiff's attorney stating that the attorney believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed the defendant's place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners."

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

(4) *Return; Amendment.* Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4(g) and (h).

(e) Appearance or Answer. If a defendant has no objection or defense to the taking of the defendant's property, the defendant may serve a notice of appearance designating the property in which the defendant claims to be interested. Thereafter, the defendant shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of the property, the defendant shall serve an answer within 20 days after the service of notice upon the defendant. The answer shall identify the property in which the defendant claims to have an interest, state the nature and extent of the interest claimed, and state all the defendant's objections and defenses to the taking of the property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not the defendant has previously appeared or answered, the defendant may present evidence as to the amount of the compensation to be paid for the property, and the defendant may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) Amendment of Pleadings. Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment and shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve an answer to the amended pleading, in the

form and manner and with the same effect as there provided.

(g) Substitution of Parties. If a defendant dies or becomes incompetent or transfers an interest after the defendant's joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d)(3) of this rule.

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

In the event that a commission is appointed the court may direct that not more than two additional persons serve as alternate commissioners to hear the case and replace commissioners who, prior to the time when a decision is filed, are found by the court to be unable or disqualified to perform their duties. An alternate who does not replace a regular commissioner shall be discharged after the commission renders its final decision. Before appointing the members of the commission and alternates the court shall advise the parties of the identity and qualifications of each prospective commissioner and alternate and may permit the parties to examine each designee.

The parties shall not be permitted or required by the court to suggest nominees. Each party shall have the right to object for valid cause to the appointment of any person as a commissioner or alternate. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

(i) Dismissal of Action.

(1) *As of Right.* If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) *By Stipulation.* Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) *By Order of the Court.* At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just

compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) *Effect.* Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

(j) Deposit and Its Distribution. The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to that defendant on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to that defendant, the court shall enter judgment against that defendant and in favor of the plaintiff for the overpayment.

(k) Condemnation Under a State's Power of Eminent Domain. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

(l) Costs. Costs are not subject to Rule 54(d).

[Added effective August 1, 1951; amended effective July 1, 1963; August 1, 1985; August 1, 1987; August 1, 1988; November 18, 1988.]

FEDERAL CONDEMNATION STATUTES

Section 1, Acquisition by Military Act, 10 U.S.C. § 2663, 70A Stat. 146 (1956), Pub. L. No. 1028, 85th Cong., 2nd Sess. (Aug. 10, 1956), *as amended by* Act of Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1565

Section 1, Navy Petroleum Reserves Act, 10 U.S.C. § 7422, 70A Stat. 458 (1956), Pub. L. No. 1028, 84th Cong., 2nd Sess. (August 10, 1956), *as last amended by* Act of November 29, 1989, Pub. L. No. 101-189, 103 Stat. 1605

Section 7(h), Natural Gas Act, 15 U.S.C. § 717f(h), 61 Stat. 459 (1947), Pub. L. No. 245, 80th Cong., 1st Sess. (July 25, 1947)

Section 3, Colonial National Historical Park Act, 16 U.S.C. § 81e, 46 Stat. 856 (1930), Pub. L. No. 510, 71st Cong., 2nd Sess. (July 3, 1930), *as amended by* Act of June 5, 1936, Pub. L. No. 666, 49 Stat. 1483

Section 2, Saratoga National Historical Park Act, 16 U.S.C. § 159a, 52 Stat. 609 (1938), Pub. L. No. 576, 75th Cong., 2nd Sess. (June 1, 1938)

Section 3, Chalmette National Historical Park Act, 16 U.S.C. § 231b, 53 Stat. 1342 (1939), Pub. L. No. 368, 76th Cong., 1st Sess. (Aug. 10, 1939), *as amended by* Act of Nov. 10, 1978, Pub. L. No. 95-625, 92 Stat. 3538

Section 2, Theodore Roosevelt National Memorial Park Act, 16 U.S.C. § 242, 61 Stat. 53 (1947), Pub. L. No. 38, 80th Cong., 1st Sess. (Apr. 25, 1947), *as amended by* Act of Nov. 10, 1978, Pub. L. No. 95-625, 92 Stat. 3521

Section 3, Cumberland Gap National Historical Park Act, 16 U.S.C. § 263, 54 Stat. 263 (1940), Pub. L. No. 586, 76th Cong., 2nd Sess. (June 11, 1940)

Section 5, Great Smoky Mountains National Park Act, 16 U.S.C. § 403i, 52 Stat. 29 (1938), Pub. L. No. 428, 75th Cong., 2nd Sess. (Feb. 12, 1938)

Section 2, Boston National Historical Park Act, 16 U.S.C. § 410z, 88 Stat. 1184 (1974), Pub. L. No. 93-431, 93rd Cong., 2nd Sess. (Oct. 1, 1974), *as last amended by* Act of Sept. 8, 1980, Pub. L. No. 96-344, 94 Stat. 1134

Section 2, Richmond National Battlefield Park Act, 16 U.S.C. § 423k, 49 Stat. 1156 (1936), Pub. L. No. 464, 74th Cong., 2nd Sess. (Mar. 2, 1936)

Section 2, Eutaw Springs Battlefield Site Act, 16 U.S.C. § 423n, 49 Stat. 1975 (1936), Pub. L. No. 825, 74th Cong., 2nd Sess. (June 26, 1936)

Section 2, Fredericksburg and Spotsylvania County Battle Fields Memorial Act, 16 U.S.C. § 425a, 44 Stat. 1092 (1927), Pub. L. No. 609, 69th Cong., 1st Sess. (Feb. 14, 1927)

Section 2, Kings Mountain National Military Park Act, 16 U.S.C. § 430a, 46 Stat. 1508 (1931), Pub. L. No. 824, 71st Cong., 1st Sess. (Mar. 3, 1931)

Section 1, Monocacy National Military Park Act, 16 U.S.C. § 430k, 48 Stat. 1198 (1934), Pub. L. No. 445, 73rd Cong., 2nd Sess. (June 21, 1934), *as amended by* Act of Oct. 21, 1976, Pub. L. No. 94-578, 90 Stat. 2738

Section 2, Kennesaw Mountain National Battlefield Park Act, 16 U.S.C. § 430u, 49 Stat. 423 (1935), Pub. L. No. 167, 74th Cong., 1st Sess. (June 26, 1935)

Section 1, Antietam Battlefield Site Act, 16 U.S.C. § 430nn, 54 Stat. 212 (1940), Pub. L. No. 510, 76th Cong., 2nd Sess. (May 14, 1940), *as last amended by* Act of Oct. 25, 1988, Pub. L. No. 100-528, 102 Stat. 2649

Section 3, Perry's Victory and International Peace Memorial Act, 16 U.S.C. § 433c, 49 Stat. 1394 (1936), Pub. L. No. 631, 74th Cong., 2nd Sess. (June 2, 1936), *as last amended by* Act of Nov. 30, 1983, Pub. L. No. 98-141, 97 Stat. 1294

Section 2, Fort Frederica National Monument Act, 16 U.S.C. § 433h, 49 Stat. 1373 (1936), Pub. L. No. 617, 74th Cong., 2nd Sess. (May 26, 1936)

Section 2, Ocmulgee National Monument Act, 16 U.S.C. § 447b, 48 Stat. 959 (1934), Pub. L. No. 350, 73rd Cong., 2d Sess. (June 14, 1934), *repealed by* Act of Sept. 28, 1976, Pub. L. No. 94-429, 90 Stat. 1342

Section 2, Pioneer National Monument Act, 16 U.S.C. § 449, 48 Stat. 983 (1934), Pub. L. No. 380, 73rd Cong., 2nd Sess. (June 18, 1934)

Section 2, Fort Stanwix National Monument Act, 16 U.S.C. § 450m, 49 Stat. 666 (1935), Pub. L. No. 291, 74th Cong., 1st Sess. (Aug. 21, 1935)

Section 2, Andrew Johnson National Historic Site Act, 16 U.S.C. § 450p, 49 Stat. 958 (1935), Pub. L. No. 388, 74th Cong., 1st Sess. (Aug. 29, 1935), *as amended by* Act of Dec. 11, 1963, Pub. L. No. 88-197, 77 Stat. 349

Section 2, Cape Hatteras National Seashore Recreational Area Act, 16 U.S.C. § 459a, 50 Stat. 669 (1937), Pub. L. No. 311, 75th Cong., 1st Sess. (August 17, 1937), *as amended by* Act of June 29, 1940, Pub. L. No. 689, 54 Stat. 702

Section 13, Indiana Dunes National Lakeshore Act, 16 U.S.C. § 460u-13, 90 Stat. 2531, 2533 (1976), Pub. L. No. 94-549, 94th Cong., 2nd Sess. (Oct. 18, 1976), *as amended by* Act of Oct. 29, 1986, Pub. L. No. 99-583, 100 Stat. 3320

Section 9, Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544g, 100 Stat. 4287 (1986), Pub. L. No. 99-663, 99th Cong., 2nd Sess. (Nov. 17, 1986)

Section 16, Great Plains Conservation Program Act, 16 U.S.C. § 590p, 49 Stat. 1151 (1936), Pub. L. No. 461, 74th Cong., 2nd Sess. (Feb. 29, 1936), *as last amended by* Act of Nov. 28, 1990, Pub. L. No. 101-624, 104 Stat. 3614

Section 21, Federal Power Act, 16 U.S.C. § 814, 41 Stat. 1074 (1920), Pub. L. No. 280, 66th Cong., 2nd Sess. (June 10, 1920)

Section 4, Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831c, 48 Stat. 60 (1933), Pub. L. No. 17, 73rd Cong., 1st Sess. (May 18, 1933), *as last amended by* Act of June 6, 1972, Pub. L. No. 92-310, 86 Stat. 206

Section 18, Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831q, 48 Stat. 67 (1933), Pub. L. No. 17, 73rd Cong., 1st Sess. (May 18, 1933)

Section 25, Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831x, 48 Stat. 70 (1933), Pub. L. No. 17, 73rd Cong., 1st Sess. (May 18, 1933), *as last amended by* Act of Sept. 28, 1968, Pub. L. No. 90-536, 82 Stat. 885

Section 2, Bonneville Project Act, 16 U.S.C. § 832a, 50 Stat. 732 (1937), Pub. L. No. 329, 73rd Cong., 1st Sess. (Aug. 20, 1937), *as last amended by* Act of Aug. 4, 1977, Pub. L. No. 95-91, 91 Stat. 578

Section 2, Fort Peck Project Act, 16 U.S.C. § 833a, 54 Stat. 404 (1938), Pub. L. No. 529, 73rd Cong., 2d Sess. (May 18, 1938)

Section 4, International Boundary Commission Act, 22 U.S.C. § 277c, 43 Stat. 118 (1924), Pub. L. No. 116, 68th Cong., 2nd Sess. (May 13, 1924), *as amended by* Act of May 22, 1936, Pub. L. No. 613, 49 Stat. 1370

Section 104, International Boundary Commission Act, 22 U.S.C. § 277d-4, 64 Stat. 847 (1950), Pub. L. No. 786, 81st Cong., 2nd Sess. (Sept. 13, 1950)

Section 2, Reindeer Industry Act, 25 U.S.C. § 500a, 50 Stat. 900 (1937), Pub. L. No. 413, 75th Cong., 1st Sess. (Sept. 1, 1937)

Section 8, Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1707, 92 Stat. 816 (1978), Pub. L. No. 95-395, 95th Cong., 2nd Sess. (Sept. 30, 1978)

Section 6, Florida Indian Land Claims Settlement Act, 25 U.S.C. § 1745, 96 Stat. 2014 (1982), Pub. L. No. 97-399, 97th Cong., 2nd Sess. (Dec. 31, 1982)

Section 1, River and Harbor Improvements Act, 33 U.S.C. § 591, 25 Stat. 94 (1888), 50th Cong., 2nd Sess. (Apr. 24, 1888)

Section 1, River and Harbor Improvements Act, 33 U.S.C. § 592, 34 Stat. 196 (1906), Pub. L. No. 169, 59th Cong., 2nd Sess. (May 16, 1906)

Section 9, River and Harbor Improvements Act, 33 U.S.C. § 593, 40 Stat. 267 (1917), Pub. L. No. 37, 65th Cong., 1st Sess. (Aug. 8, 1917)

Section 401, Postal Service Act, 39 U.S.C. § 401, 84 Stat. 722 (1970), Pub. L. No. 91-375, 91st Cong., 2nd Sess. (Aug. 12, 1970)

Section 1, General United States Condemnation Authority Act, 40 U.S.C. § 257, 25 Stat. 357 (Aug. 1, 1888), *as amended by* Act of June 25, 1948, Pub. L. No. 773, 62 Stat. 986

Section 2, Capitol and Whitehouse—Pennsylvania Avenue Development Act, 40 U.S.C. § 873, 86 Stat. 1266 (1972), Pub. L. No. 92-578, 92nd Cong., 2nd Sess. (Oct. 27, 1972)

Section 2, Federal Triangle Development Act, 40 U.S.C. § 1101, 101 Stat. 735 (1987), Pub. L. No. 100-113, 100th Cong., 1st Sess. (Aug. 21, 1987)

Section 1, General United States Condemnation Authority Act, 40 U.S.C. § 2589, 46 Stat. 1421 (1931), Pub. L. No. 736, 71st Cong., 1st Sess. (Feb. 26, 1931)

Section 202, Housing of Persons Engaged in National Defense Act, 42 U.S.C. § 1502, 54 Stat. 683 (1940), Pub. L. No. 671, 76th Cong., 2nd Sess. (June 28, 1940), *as last amended by* Act of Sept. 9, 1965, Pub. L. No. 89-174, 79 Stat. 669

Section 43, Atomic Energy Act of 1954, 42 U.S.C. § 2063, 68 Stat. 929 (1954), Pub. L. No. 703, 83rd Cong., 2nd Sess. (Aug. 30, 1954)

Section 55, Atomic Energy Act of 1954, 42 U.S.C. § 2075, 68 Stat. 931 (1954), Pub. L. No. 703, 83rd Cong., 2nd Sess. (Aug. 31, 1954), *as last amended by* Act of Mar. 10, 1978, Pub. L. No. 95-242, 92 Stat. 131

Section 66, Atomic Energy Act of 1954, 42 U.S.C. § 2096, 68 Stat. 933 (1954), Pub. L. No. 703, 83rd Cong., 2nd Sess. (Aug. 30, 1954)

Section 301, Uniform Relocation Assistance and Real Property Acquisition Act, 42 U.S.C. § 4651, 84 Stat. 1904 (1971), Pub. L. No. 91-646, 91st Cong., 1st Sess. (Jan. 2, 1971)

Section 7, Reclamation and Irrigation of Lands Act, 43 U.S.C. § 421, 32 Stat. 389 (1902), Pub. L. No. 161, 57th Cong., 1st Sess. (June 17, 1902)

Section 1, Boulder Canyon Project Act, 43 U.S.C. § 617, 45 Stat. 1057 (1928), Pub. L. No. 642, 70th Cong., 2nd Sess. (Dec. 21, 1928)

Section 302, Colorado River Basin Project Act, 43 U.S.C. § 1522, 82 Stat. 888 (1968), Pub. L. No. 90-537, 90th Cong., 2nd Sess. (Sept. 30, 1968), *as amended by* Act of Nov. 28, 1990, Pub. L. No. 101-628, 104 Stat. 4491

Section 101, Colorado River Basin Salinity Control Program Act, 43 U.S.C. § 1571, 88 Stat. 266 (1974), Pub. L. No. 93-320, 93rd Cong., 2nd Sess. (June 24, 1974), *as amended by* Act of Sept. 4, 1980, Pub. L. No. 96-336, 94 Stat. 1063

Section 102, Colorado River Basin Salinity Control Program Act, 43 U.S.C. § 1572, 88 Stat. 268 (1974), Pub. L. No. 93-320, 93rd Cong., 2nd Sess. (June 24, 1974)

Section 103, Colorado River Basin Salinity Control Program Act, 43 U.S.C. § 1573, 88 Stat. 269 (1974), Pub.

L. No. 93-320, 93rd Cong., 2nd Sess. (June 24, 1974), *as amended by* Act of Sept. 4, 1980, Pub. L. No. 96-336, 94 Stat. 1063

Section 110, Colorado River Basin Salinity Control Program Act, 43 U.S.C. § 1579, 94 Stat. 1064 (1980), Pub. L. No. 96-336, 96th Cong., 2nd Sess. (Sept. 4, 1980)

Section 205, Federal Land Policy and Management Act, 43 U.S.C. § 1715, 90 Stat. 2755 (1976), Pub. L. No. 94-579, 94th Cong., 2nd Sess. (Oct. 21, 1976), *as amended by* Act of Nov. 7, 1986, Pub. L. No. 99-632, 100 Stat. 3521

Section 305, Amtrak Improvement Act, 45 U.S.C. § 545, 84 Stat. 1332 (1970), Pub. L. No. 91-518, 91st Cong., 2nd Sess. (Oct. 30, 1970), *as last amended by* Act of Apr. 7, 1986, Pub. L. No. 99-272, 100 Stat. 108, 310

Section 303, Federal Aviation Act of 1958, 49 U.S.C. § 1344, 72 Stat. 747 (1958), Pub. L. No. 85-726, 85th Cong., 2nd Sess. (Aug. 23, 1958), *as last amended by* Act of Nov. 5, 1990, Pub. L. No. 101-508, 104 Stat. 1388-365

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Section 3, Helium Gas Act, 50 U.S.C. § 167a, 74 Stat. 918 (1960), Pub. L. No. 86-777, 86th Cong., 2nd Sess. (Sept. 13, 1960)

Section 8, Helium Gas Act, 50 U.S.C. § 167f, 74 Stat. 922 (1960), Pub. L. No. 86-777, 86th Cong., 2nd Sess. (Sept. 13, 1960)